No. 98-591

In the Supreme Court of the United States

OCTOBER TERM, 1998

ALBERTSONS, INC., PETITIONER

v.

HALLIE KIRKINGBURG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether there are genuine issues of material fact as to whether respondent was disabled, within the meaning of 42 U.S.C. 12102(2)(A), when petitioner fired him from his job as a truck driver.

2. Whether there are genuine issues of material fact as to whether respondent, who had received a vision waiver from the Department of Transportation to drive a commercial truck in interstate commerce, was "qualified" to be a truck driver for petitioner.

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INTEREST OF THE UNITED STATES

This case concerns the definitions of "disability" and "qualified individual with a disability," two important statutory terms in the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq*. Congress delegated to the Equal Employment Opportunity Commission (EEOC) and the Department of Justice authority to promulgate regulations and to enforce the provisions of the ADA. Both agencies have issued extensive regulations and interpretive guidance concerning the definition of these terms. In addition, this case concerns the extent to which vision waivers issued by the Department of Transportation pursuant to the Motor Carrier Safety Act of 1984, 49 U.S.C.

31131 *et seq.*, may affect an employer's obligation to comply with the ADA.

STATEMENT

1. The Motor Carrier Safety Act of 1984 (Safety Act) directs the Secretary of Transportation to "prescribe regulations on commercial motor vehicle safety," that "ensure that * * * the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely." 49 U.S.C. 31136(a)(3). The Act also provides that "[e]ach employer and employee shall comply with regulations on commercial motor vehicle safety prescribed by the Secretary of Transportation * * * that apply to the employer's or employee's conduct." 49 U.S.C. 31135. During the time period relevant to this litigation, the Act authorized the Secretary to "waive any part of a regulation * * * as it applies to a person or class of persons, if the Secretary decides that the waiver is consistent with the public interest and the safe operation of commercial motor vehicles." 49 U.S.C. 31136(e).[1] If the Secretary waives a regulation (such as the vision standards at issue here), it no longer "appl[ies]" to employers and employees under Section 31135, and they need not comply with it.

The Secretary has delegated regulatory authority under the Safety Act to the Federal Highway Administration (FHWA). 49 C.F.R. 1.48(aa), 1.48(f). Under FHWA regulations, persons who operate commercial vehicles that weigh more than 10,000 lbs. and transport persons or property in interstate commerce must undergo a physical examination

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[1] Congress amended the waiver provisions, effective June 9, 1998, in the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107. The new statute provides that the Secretary may issue an "exemption" for a renewable 2-year period, if he finds that "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." See § 4007, 112 Stat. 401 (codified at 49 U.S.C. 31315).

every two years to determine whether they can be certified as satisfying the requisite physical qualifications. See 49 C.F.R. 390.3(a), 390.5, 391.43, 391.45., 391.45(b)(1).

Under the federal vision standards that have been in effect since 1971, an individual is qualified to drive a commercial vehicle in interstate commerce if that person, *inter alia*, "[h]as distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses." 49 C.F.R. 391.41(b)(10); 35 Fed. Reg. 6458 (1970). That standard excludes individuals who have poor vision in one eye that cannot be corrected.

2. Respondent Hallie Kirkingburg has been driving commercial trucks since 1979. J.A. 228, 286-287. The vision in respondent's right eye is 20/20 and his vision in both eyes is at least 20/25. J.A. 34-35, 99-101. The vision in respondent's left eye, however, has been 20/200 since birth. J.A. 34-35. The poor vision is caused by amblyopia, a condition commonly referred to as "lazy eye," and it is not correctable by corrective lenses. J.A. 35. Respondent's treating optometrist, Dr. Beatrice Michel, O.D., testified that respondent's vision is essentially monocular. J.A. 306 (respondent "has always functioned as a one- eyed person"). She also testified, however, that respondent has learned to rely on "monocular cues" to compensate for restrictions on his ability to perceive depth. J.A. 300-303. Dr. Michel testified that in her medical opinion respondent can drive a commercial vehicle as well as a person with standard vision in both eyes. J.A. 36, 305-306.

In August 1990, petitioner Albertson's, Inc. hired respondent as a driver at its distribution center in Portland, Oregon. J.A. 228, 275, 367. Prior to starting work for petitioner, respondent was examined by a physician who certified that respondent's vision met the requirements established by the Department of Transportation (DOT). J.A. 99-101. Respondent also satisfactorily completed an

eighteen-mile road test administered by Albertson's. C.A. Rec. 133-134, 144.

In December 1991, respondent injured his head when he fell from a company truck. J.A. 367. He was unable to work for almost a year. J.A. 283. Petitioner required respondent to have a new physical examination by one of its contract physicians before returning to work. J.A. 283. A physician examined respondent on November 5, 1992. J.A. 357. The physician informed respondent that his vision did not meet federal standards and that he would have to obtain a vision waiver from DOT. J.A. 284. Respondent promptly applied for a waiver on Nov. 12, 1992. J.A. 369.

Petitioner dismissed respondent by telephone on November 20, 1992, and told him that petitioner would not accept a vision waiver. J.A. 364. Franklin Delano Riddle, the general manager at petitioner's Portland Distribution Center, J.A. 312, made the decision to fire respondent, J.A. 314. Riddle told another employee that they would have to fire respondent because "he was legally blind, or blind in one eye." J.A. 341.

At the time of respondent's termination, petitioner's employment manual required drivers to "comply with all Department of Transportation, Interstate Commerce Commission and Company safety rules." J.A. 333. The company had no written vision standards or policy regarding waivers. J.A. 332-334, 340. Petitioner's sole basis for deciding not to accept the waivers was its concern about safety. J.A. 315, 323.

DOT issued respondent a vision waiver on February 25, 1993, authorizing him to "operate a CMV [commercial motor vehicle] in interstate commerce." J.A. 379, 381. Respondent informed petitioner that he had obtained a vision waiver, but petitioner refused to reinstate him as a driver. J.A. 276, 385-386, 393. After respondent filed a union grievance, petitioner offered respondent a position as a yard hostler, a position that involved moving trailers on company property.

J.A. 388. Petitioner later withdrew the offer, however, claiming that DOT certification was required for the position.[2] J.A. 395-396.

3. Respondent filed suit in the United States District Court for the District of Oregon alleging that petitioner's conduct violated the ADA. J.A. 4. Petitioner moved for summary judgment on the sole ground that respondent was not "qualified" for a driving position with petitioner; petitioner did not argue that respondent was not disabled, J.A. 39-48, but instead stated in its moving papers that "[s]hould this case go to trial, [respondent] will of course bear the burden of proving *all* elements of his ADA claim, including the existence of a covered 'disability.'" J.A. 60 n.1. The district court granted petitioner's motion on October 25, 1995. J.A. 122. The court held that petitioner "properly considered meeting DOT minimum requirements" to be an essential function of the job, and that "the ADA does not obligate [petitioner] to employ truck drivers who have received vision waivers." J.A. 119-120.

4. On appeal, a divided panel of the United States Court of Appeals for the Ninth Circuit reversed. Petitioner argued, apparently as an alternative ground for affirmance, that respondent was not disabled because he was not substantially limited in the major life activity of seeing. The court did not refer to the fact that petitioner had never moved for summary judgment on that ground, but instead rejected petitioner's argument on its merits. Noting that EEOC regulations define an impairment to be substantially limiting if it "significantly restricts as to the condition, man-

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[2] DOT certification would not have been required for such a position if it did not involve driving on the road. Petitioner later offered respondent a position as a tire mechanic. Respondent turned down the position, in part because the pay was substantially below what he had received as a driver. J.A. 281-282.

ner or duration under which an individual can perform a particular major life activity," the court held:

> Kirkingburg's inability to see out of one eye affects his peripheral vision and his depth perception. Although his brain has developed subconscious mechanisms for coping with this visual impairment and his body compensates for his disability, the *manner* in which he sees differs significantly from the *manner* in which most people see. To put it in its simplest terms, Kirkingburg sees using only one eye; most people see using two.

J.A. 234-235. As an "alternative ground for [its] decision," the court held that evidence that one of [petitioner's] managers described him as "blind in one eye, or legally blind" was sufficient to raise a genuine issue as to whether [petitioner] regarded respondent as disabled. J.A. 236-237.

The court further held that respondent had raised a genuine issue of material fact as to whether he was "qualified" to drive a truck. The court held that respondent's record of driving commercial trucks safely was sufficient to establish that he could perform the essential functions of the job. J.A. 237-238. The court rejected petitioner's argument that federal law precluded it from allowing respondent to drive. The court noted that the Safety Act authorized DOT to waive its regulatory requirements and that respondent had obtained a waiver. J.A. 239-240.

The court further held that petitioner had presented no evidence that respondent or other commercial drivers who met the vision waiver requirements were a direct safety threat. J.A. 246. The court added that petitioner was not in any event free to adopt stricter safety standards than those required by federal law. The court held that in light of the FHWA's determination that waiver recipients do not pose a threat to public safety, petitioner was precluded from asserting that they do. The court left open the possibility that

petitioner might be able to adhere to stricter standards if it established that the work its drivers performed was substantially different from the work performed by other commercial truck drivers. J.A. 247-248.

Judge Rymer dissented on the ground that respondent had not established that he was "qualified". She asserted that petitioner was not required to honor respondent's waiver because in 1992 the agency had not had a basis for determining that the waivers would be consistent with public safety. J.A. 249-254.

SUMMARY OF ARGUMENT

The court of appeals correctly decided that petitioner was not entitled to summary judgment on the ground that respondent was not disabled. Initially, the court of appeals' holding can be affirmed on the basis that petitioner did not move for—and was not granted—judgment on the ground that respondent was not disabled. In any event, monocular vision is frequently a disability under the ADA, because it substantially limits both the amount (the visual field) and the quality (the ability to see in three dimensions) of an individual's major life activity of seeing. The fact that it may not also limit other "normal daily activities" of the individual, see Pet. Br. 22, is of no significance, because the ADA is largely premised on the principle that individuals who are limited in one or more major life activities (here, seeing) can overcome those limitations to perform many activities (including working) competently and effectively.

Petitioner argues that the court of appeals erred in holding that it was not entitled to summary judgment on the ground that respondent was not "regarded as" disabled. The petition for certiorari did not present any question concerning the court of appeals' "regarded as" holding, and accordingly petitioner's "regarded as" argument is not properly before the Court. In any event, the court of appeals correctly held that petitioner's statement that respondent

was, *inter alia*, "legally blind" was sufficient to create a material issue of fact concerning whether petitioner regarded respondent as disabled. In addition, evidence of petitioner's apparent belief that respondent could not safely perform any job that required DOT certification is sufficient to create a material issue of fact as to whether petitioner regarded respondent as substantially limited in the major life activity of working.

The court of appeals was also correct in holding that petitioner was not entitled to summary judgment on the ground that respondent was not qualified for his job. A qualification standard, such as petitioner's binocular vision standard, must be justified under the ADA in terms of job-relatedness and consistency with business necessity. In the case of qualification standards that are based on a safety rationale, that requires an inquiry into whether respondent would pose a "direct threat" to the health of safety of himself or others. Although that defense may be made out when an employer takes an action required by a federal safety standard, petitioner cannot rely on that justification here, since petitioner could have complied with all applicable regulations by permitting respondent to apply for a vision waiver, which respondent ultimately did obtain. Because there was substantial evidence that respondent could safely drive a truck, and because the only evidence pointed to by petitioner to the contrary was the (waivable) federal binocular vision standard that petitioner adopted without the waiver component, there remain substantial issues of material fact that would preclude granting summary judgment to petitioner on this ground.

ARGUMENT

I. PETITIONER WAS NOT ENTITLED TO SUMMARY JUDGMENT ON THE GROUND THAT RESPONDENT IS NOT A PERSON WITH A DISABILITY

A. Respondent's Claim Of Actual Disability Was Not Challenged By Petitioner's Summary Judgment Motion, And Respondent Therefore Did Not Offer The Ample Available Evidence To Support It

Petitioner's summary judgment motion did not challenge respondent's claim of "disability," but instead challenged only his claim that, despite his disability, he was "qualified" for the job. J.A. 39-40. Therefore, respondent did not develop the summary judgment record regarding the nature and extent of his impairment to show that his monocular vision constituted a disability.

When petitioner challenged the existence of a disability for the first time on appeal, see J.A. 182-185, the court of appeals declined to hold that petitioner was entitled to summary judgment on the issue. J.A. 234-237. That holding was correct, because it cannot be said that respondent could not meet a properly supported summary judgment motion on this point. To the contrary, as set forth below, monocular vision will frequently constitute a disability within the meaning of the statute—"a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual," 42 U.S.C. 12102(2)(A)—namely, the major life activity of seeing.

1. Petitioner acknowledges that it "filed for summary judgment on the ground that [respondent] was not a qualified individual, with or without accommodation, under the ADA because he could not meet the DOT vision standards." Pet. 11; see J.A. 39-40. Petitioner did not move for summary judgment on the ground that respondent was not disabled, and the district court did not address that issue in the course

of its decision to grant summary judgment to petitioner on the ground that petitioner was not "qualified." J.A. 115-121.

In *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986), this Court noted that under Federal Rule of Civil Procedure 56, "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion." *Id.* at 323. The moving party's discharge of that responsibility in turn "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324. See also *id.* at 328 (White, J., concurring). If the party has not been placed on notice that summary judgment may be entered against it on a particular ground, any absence of sufficient evidence to create a material issue of fact essential to that ground does not betoken the lack of a genuine dispute between the parties.[3]

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[3] As the Court noted in *Celotex*, a district court has authority to enter summary judgment *sua sponte*—but only if "the losing party was on notice that she had to come forward with all of her evidence." 477 U.S. at 326. The lower courts have uniformly held that summary judgment may not be entered against a party that had no notice or that was not given the full ten-day period provided by Rule 56(c) to produce its evidence for the summary judgment record. See, *e.g.*, *National Fire Ins.* v. *Bartolazo*, 27 F.3d 518, 519 (11th Cir. 1994); *Otis Elevator Co.* v. *George Washington Hotel Corp.*, 27 F.3d 903, 909-910 (3d Cir. 1994); *Stella* v. *Town of Tewksbury*, 4 F.3d 53 (1st Cir. 1993); *Peckmann* v. *Thompson*, 966 F.2d 295, 297 (7th Cir. 1992); *Judwin Properties, Inc.* v. *United States Fire Ins. Co.*, 973 F.2d 432, 436-437 (5th Cir. 1992); *Winbourne* v. *Eastern Air Lines, Inc.*, 632 F.2d 219 (2d Cir. 1980).

Petitioner's argument illustrates the difficulty of viewing the summary judgment record in this case as if it were complete. Petitioner relies heavily on respondent's reply, "Not that I recall," to the question whether his impairment has ever interfered with his work. See Br. 23. That answer may be of relevance had respondent claimed to be limited in *working*, but it does not suggest that respondent is not substantially limited in the major life activity of *seeing*.

Because petitioner failed to move for summary judgment on the question whether respondent was a person with a disability, summary judgment may not be entered against respondent on that ground. The only possible exception to that rule would be if it could be shown that the party against whom summary judgment is sought could not possibly have introduced evidence in support of its claim, *i.e.*, if the pleadings are essentially sufficient to warrant judgment against that party. As we show below, however, there is ample support for the proposition that monocular vision is ordinarily a disability under the ADA, because it substantially limits the major life activity of seeing.[4] The Ninth Circuit therefore correctly declined to grant summary judgment to petitioner on the ground that monocular vision is not a disability.

2. The ADA defines a "disability" in terms of three separate, alternative criteria. Under the first criterion—actual disability—a disability is "a physical or mental impairment that substantially limits one or more * * * major life activities." 42 U.S.C. 12102(2)(A). There is no dispute that monocular vision is a "physical * * * impairment." See 29 C.F.R. 1630.2(h)(1); *Bragdon* v. *Abbott*, 118 S. Ct. 2196, 2202 (1998). Monocular vision frequently substantially limits the major life activity of seeing.[5] See *id.* at 2205 ("seeing" is major life activity); 29 C.F.R. 1630.2(i) (same).

EEOC regulations state that an impairment is substantially limiting if it "[s]ignificantly restrict[s] * * * the condition, manner or duration under which an individual can perform a particular major life activity as compared to the

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[4] See *Doane* v. *City of Omaha*, 115 F.3d 624 (8th Cir. 1997), cert. denied, 118 S. Ct. 693 (1998); *EEOC* v. *Union Pac. R.R.*, 6 F. Supp. 2d 1135 (D. Idaho 1998); *Coleman* v. *Southern Pac. Transp. Co.*, 997 F. Supp. 1197 (W.D. Ariz. 1998); *Magiera* v. *Ford Motor Co.*, No. 97C0421, 1998 WL 704061 (N.D. Ill. Sept. 30, 1998).

[5] Any issues regarding whether there are differences among monocular individuals based on the extent of vision loss in the affected eye and precise measures of respondent's vision would remain open on remand.

condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. 1630.2(j).[6] The regulations thus correctly recognize that an impairment may substantially restrict the process by which a person performs a major life activity, even if they do not make performance of that activity impossible. See *Bragdon*, 118 S. Ct. at 2206 ("The Act addresses substantial limitations on major life activities, not utter inabilities.").

3. Studies of monocular vision indicate that it often substantially limits vision.[7] Most studies agree that the most significant limitations of monocular vision are reduced field of vision and lack of binocular depth perception. See, *e.g.*, A. J. McKnight et al., *The Visual and Driving Performance of Monocular and Binocular Heavy-Duty Truck Drivers*, 23 Accid. Anal. & Prev. 225 (1991). With respect to visual field, one study found that, on average, persons with monocular vision had a visual field of 145 degrees as compared to 173 degrees for persons with binocular vision. *Id.* at 231. That study concluded that this difference was "obviously highly significant both statistically and practically." *Ibid.*

Persons with monocular vision also lack binocular depth perception. Binocular vision enables persons to achieve

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[6] "As the agency directed by Congress to issue implementing regulations [see 42 U.S.C. 12116], to render technical assistance explaining the responsibilities of covered individuals and institutions [see 42 U.S.C. 12206(c)(1)-(2)(A)], and to enforce Title [I] in court [see 42 U.S.C. 12117(a)], the [EEOC]'s views are entitled to deference." *Bragdon*, 118 S. Ct. at 2209 (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). The EEOC's commentary interpreting its own regulations and its Technical Assistance Manual are also "entitled to deference." See *Stinson* v. *United States*, 508 U.S. 36, 45 (1993).

[7] The court of appeals noted not only that respondent sees in a different "manner," but also that his vision is "limited" in both depth perception and peripheral vision. J.A. 234-235.

"stereopsis," *i.e.* to see objects in three dimensions. See Hugh Davson, *The Physiology of the Eye* 351 (2d Ed. 1963); Samuel L. Fox, *Industrial and Occupational Ophthalmology* 23 (1973). Because the two eyes are separated laterally, their two images are not identical; one eye receives a right-view of the object and the other a left-slanted view. When the two images are merged in the visual cortex, a three-dimensional image results. *Ibid.*

Persons with monocular vision are not able to achieve stereopsis and therefore do not see objects in a three-dimensional pattern. Davson, *supra*, at 351. Stereopsis is not, however, the only method of perceiving depth. There are a variety of "monocular cues" (*i.e.*,visual observations that do not require binocular vision) that can contribute to depth perception. See, *e.g.*, Esther G. Gonzalez et al., *Depth Perception in Children Enucleated at an Early Age*, 4 Clin. Vision Sci. 173 (1988); see also James E. Sheedy, *et al.*, *Binocular vs. Monocular Task Performance*, 63 Am. J. of Optometry & Physiological Optics 839 (1986); J.A. 301. There is also evidence that many people adjust to loss of vision in one eye in approximately one year or less. Gonzalez, *supra*, at 173. Researchers have concluded that stereopsis is most important at perceiving depths less than six meters away, cf. J.A. 300, but that it can contribute to depth perception for distances up to 185 meters. McKnight, *supra*, at 227.

4. Taken together, the limitations monocular vision imposes on a person's ability to see, in terms of field of vision and lack of three-dimensionality, are "substantial" within the meaning of the ADA and "significant" within the meaning of the EEOC's implementing regulations. Both the amount that a monocular person sees and the quality of what such a person sees may be substantially less than that of an individual with binocular vision. The amount is less because, as noted above, when a person with one functioning eye looks out at the world, that person sees a substantially

narrower field than when an individual with binocular vision looks at the same place. And the quality is less because, as explained above, a monocular individual will be unable to perceive an essential quality of objects—their three-dimensional nature—through his eyes. In our view, monocularity will therefore frequently be a disability under the ADA.

5. Petitioner argues that a person is disabled within the meaning of the ADA only if the person cannot "otherwise perform normal daily activities requiring eyesight," and that respondent's monocular vision does not satisfy that test. Pet. Br. 22 (citing *Still* v. *Freeport McMoran, Inc.*, 120 F.3d 50, 53 (5th Cir. 1997)). The test proposed by petitioner, however, is not the test required by the ADA or its implementing regulations. The pertinent inquiry under the ADA is whether one or more major life activities is substantially limited, see *Bragdon*, 118 S. Ct. at 2202, not whether the person is able to overcome those limitations when performing *other* activities. Taken to its logical conclusion, petitioner's test would justify the conclusion that a particularly vigorous person who uses a wheelchair is not disabled because he or she can drive a car, complete a marathon, live independently, and perform other activities as effectively as a person without mobility impairments. Title I of the ADA was premised in part on the principle that individuals with disabilities can overcome them to perform many activities competently and effectively, if employers will only give them the chance to do so.[8] The fact that an individual can function well in a wide range of activities, therefore, cannot be the

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[8] See, *e.g.*, H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2, at 46 (1990) (House Labor Rep.) ("How many well educated and highly capable people with disabilities must sit down at home every day, not because of their lack of ability, but because of the attitudes of employers, service providers, and government officials?") (quoting testimony before House Subcommittee on Select Education, Ser. No. 101-56, August 28, 1989, at 67.)

basis for excluding that individual from the class protected by the statute.

B. The Court Of Appeals' Ruling On Respondent's Alternative Claim That He Was "Regarded As" Disabled Was Not Challenged By The Petition For Certiorari And Is Not Properly Before This Court

1. The petition for a writ of certiorari sought review on one and only one question concerning whether respondent is a person with a disability: "[w]hether a monocular individual is 'disabled' per se, under the Americans with Disabilities Act ("ADA") 42 U.S.C. § 12112(a) (1994)." Pet. i. It is quite clear, for two reasons, that that question brought the Ninth Circuit's "actual disability" analysis under 42 U.S.C. 12102(2)(A)—not its "regarded as" holding under 42 U.S.C. 12102(2)(C)—before this Court.

First, the body of the petition argued only that the Ninth Circuit had held that a monocular driver has a "per se" actual disability, see Pet. 15-16, and that such a holding conflicted with the decision of the Fifth Circuit in *Still* v. *Freeport McMoran, Inc.*, 120 F.3d 50 (1997), see Pet. 16. The petition presented no argument or discussion whatsoever concerning the Ninth Circuit's "regarded as" holding.

Second, the Ninth Circuit's "regarded as" holding plainly was not a "per se" holding, and therefore could not have come within the question presented. The Ninth Circuit's entire discussion consisted of its reference to the "regarded as" provision of the ADA and the statement that "[b]ecause [respondent] has presented evidence showing that one of [petitioner's] managers described him as 'blind in one eye or legally blind,' he has established a genuine issue as to whether his employer believed he was disabled." J.A. 237. The Ninth Circuit's ruling was thus based on an inference that could be drawn from a particular statement of petitioner's manager, and it could not be reasonably understood

to be a holding that people with monocular vision are "per se" regarded as disabled.

2. Petitioner's brief on the merits (Br. i) adds a new question to those presented in the petition: "Whether a remark that a monocular driver is blind in one eye supports a claim that an employer regards that individual as disabled under the ADA." Under Rule 14.1(a) of the Rules of this Court, "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court."[9] See also Sup. Ct. R. 24.1(a). Because the petition for certiorari in this case did not present any question concerning the court of appeals' "regarded as" ruling, and because no such question is fairly included in the questions presented, this Court should not reach respondent's challenge to the court of appeals' "regarded as" ruling.[10] We nonetheless briefly address the merits of petitioner's argument.

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[9] Amicus United Parcel Service argues (Br. 20) that the court of appeals' "regarded as" holding "is dependent on the court's initial conclusion that monocular vision constitutes a disability *per se*." Even if it were so dependent, that would not alter the fact that no question concerning the court of appeals' "regarded as" holding is properly before this Court. In any event, the court of appeals' "regarded as" holding was not "dependent" on any earlier part of its analysis. Instead, it rested on the evidence that respondent's supervisor said, *inter alia*, that respondent was "legally blind." If viewed in the light most favorable to respondent, that evidence would certainly be sufficient to raise an inference that the supervisor regarded him as disabled, *i.e.*, substantially limited in the major life activity of seeing, regardless of whether monocular vision constitutes an actual disability, either per se or on the facts of this case. Thus, the court of appeals' "regarded as" holding is truly, as the court of appeals stated, an "alternative ground," J.A. 236, and it stands entirely independent of the court of appeals' "actual disability" discussion.

[10] The Ninth Circuit's holding concerning respondent's "regarded as" disability was sufficient to support its judgment that petitioner could not be granted summary judgment on the ground that respondent is not disabled. That would ordinarily provide a powerful reason for this Court not to reach even the question whether respondent had an "actual" disability. By not including any such argument in his brief in opposition,

3. An individual is "disabled" under the ADA not only if the individual has an impairment "that substantially limits one or more of the major life activities of such individual," 42 U.S.C. 12102(2)(A), but also if the individual is "regarded as having such an impairment," 42 U.S.C. 12102(2)(C). The "regarded as" provision reflects Congress' concern with protecting persons with disabilities from the "effects of erroneous but nevertheless prevalent perceptions" about disabling conditions. See *School Bd.* v. *Arline*, 480 U.S. 273, 279 (1987). The record in this case contains sufficient evidence that respondent regarded petitioner as having an impairment (his impaired vision) that substantially limited petitioner in the major life activities of seeing and working.

a. Because there is no dispute that petitioner was aware of respondent's vision impairment, the sole remaining question is whether petitioner viewed that impairment as substantially limiting one of his major life activities. Franklin Delano Riddle, the manager who made the decision to fire respondent, stated that respondent was "legally blind, or blind in one eye." J.A. 341. Taken in the light most favorable to respondent, this statement indicates that Riddle believed that respondent was "legally blind." The fact that an employer regards an employee as "legally blind" is ample to support an inference that the employer regards the employee as substantially limited in the major life activity of seeing. See *Norcross* v. *Sneed*, 755 F.2d 113 (8th Cir. 1985) (legal blindness is a handicap under the Rehabilitation Act).

Petitioner argues (Br. 28) that there is no causal connection between Riddle's statement and the decision to terminate respondent. Whether petitioner fired respondent because it regarded him as "legally blind," however, con-

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however, respondent appears to have waived any argument that the Court should not reach the "actual disability" issue. See Sup. Ct. R. 15.2. This Court of course retains the discretion to decline to reach the "actual disability" issue.

cerns whether discrimination has occurred under 42 U.S.C. 12112, not whether he was "regarded as" disabled under 42 U.S.C. 12102(2)(C). In any event, such questions of causality must be resolved at trial. The court of appeals correctly held that Riddle's statement is sufficient to raise a genuine issue of material fact on the "regarded as" issue.[11]

b. Alternatively, there is sufficient evidence that petitioner regarded respondent as substantially limited in the major life activity of working. EEOC regulations provide that a person is substantially limited in the ability to work if the person is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. 1630.2(j)(3)(i). The regulations add that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Ibid.*[12]

Viewed in the light most favorable to respondent, the record demonstrates that petitioner regarded respondent's visual impairment as preventing him from safely performing any job that required DOT certification. See J.A. 345, 396. DOT certification is necessary for "all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce." 49 C.F.R. 390.3(a).

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[11] For similar reasons, petitioner's argument (Br. 26-27) that it could not have regarded respondent as substantially limited in the ability to see because it later offered him a position as a tire mechanic raises factual questions that cannot be resolved on summary judgement. Among other things, the offer came long after the termination, see J.A. 395, and therefore may be of quite limited value in assessing how Riddle regarded respondent at the time that he fired him.

[12] As we explain in our brief (at 13-14) as amicus curiae in *Sutton* v. *United Air Lines*, No. 97-1943, the "class of jobs or broad range of jobs in various classes" requirement was not intended to impose an onerous burden on plaintiffs, but merely to ensure that the limitation on working is not trivial or insubstantial.

Thus, there is evidence that petitioner regarded respondent as restricted from either a "class of jobs or a broad range of jobs in various classes," 29 C.F.R. 1630.2(j)(3)(i), namely, most of the truck driving jobs for which respondent was trained, and hence substantially limited in the major life activity of working. Accordingly, the record in this case precludes summary judgment for petitioner on the question whether respondent was "regarded as" disabled.

II. PETITIONER WAS NOT ENTITLED TO SUMMARY JUDGMENT ON THE GROUND THAT RESPONDENT, AS A RESULT OF HIS MONOCULAR VISION, WAS NOT QUALIFIED TO DRIVE A TRUCK FOR PETITIONER

Petitioner argues that the district court correctly granted it summary judgment on the ground that, assuming respondent was disabled, his monocular vision rendered him not "qualified" to serve as a truck driver for petitioner. To the contrary, there are serious issues of material fact that preclude a grant of summary judgment to petitioner on that ground.

A. An Employer May Not Employ Qualification Standards That Tend To Screen Out Disabled Persons Unless Those Standards Can Be Justified Under The ADA

1. Title I of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability." 42 U.S.C. 12112(a). The Act provides that "the term 'discriminate' includes * * * using qualification standards * * * that screen out or tend to screen out an individual with a disability * * * unless the standard, * * * as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. 12112(b)(6). Correspondingly, the Act provides that "[i]t may be a defense to a charge of

discrimination * * * that an alleged application of qualification standards * * * that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." 42 U.S.C. 12113(a).

Putting the above provisions together, if a qualification standard is "job-related" and "consistent with business necessity" and if its purpose cannot "be accomplished by reasonable accommodation," then its use by an employer to screen out persons with disabilities is permissible under the ADA. But if a qualification standard is not "job-related" and "consistent with business necessity," or if its purpose can "be accomplished by reasonable accommodation," then its use by an employer to screen out persons with disabilities is discrimination under the ADA and is illegal.

2. Petitioner argues (Br. 33) that it "is not required to justify its decision regarding the stringency of the qualitative standards applied to each position." That argument is inconsistent with the statutory provisions cited above, which plainly require such justification in terms of job-relatedness, business necessity, and reasonable accommodation. Indeed, the perfectly general terms of the cited provisions are applicable to all types of selection criteria, including "safety requirements [and] *vision* or hearing requirements."[13] 29 C.F.R. Pt. 1630 App. § 1630.10 (emphasis added). The core purpose of the ADA "to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job," *ibid.*, can be accomplished only by requiring justification for qualification standards that tend to screen out disabled persons.

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[13] See generally, S. Rep. No. 116, 101st Cong., 1st Sess. 37-39 (1989) (Senate Rep.); House Labor Rep. at 70-72; H.R. Rep. No. 485, *supra*, Pt. 3, at 42 (House Judiciary Rep.).

Petitioner asserts (Br. 32-33) that it need not justify its qualification standards because the EEOC has stated that "[i]t is the employer's province to establish what a job is and what functions are required to perform it" and that "the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards * * * nor to require employers to lower such standards." The EEOC's position about essential functions and production standards, however, is of no relevance to any issue in this case. There is no dispute that, as petitioner states, "driving a truck in interstate commerce is an essential function of the truck driving position" at issue here. Pet. 35. This case accordingly does not present any question concerning how to identify the essential functions of a job.[14] Nor does this case involve any question regarding "production standards," such as the number of hours a day a driver should drive. The case does squarely present the question whether petitioner's qualification standard is, as a matter of law, job-related and consistent with business necessity under the ADA.

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[14] Citing 42 U.S.C. 12111(8), petitioner states (Br. 14) that "[t]he ADA expressly recognizes that consideration shall be given to the employer's judgment in determining who is qualified." Section 12111(8), however, provides that "consideration shall be given to the employer's judgment as to what functions of a job are essential," not who is qualified for a job. See also 29 C.F.R. 1630.2(n)(1) (defining "essential functions" as "the fundamental job duties of the employment position"). If this case did involve a dispute about the essential functions of a job, it would be significant that the quoted language requires only that "consideration"—not preclusive effect—be given to the employer's judgment concerning what job functions are essential. See *Deane* v. *Pocono Med. Ctr.*, 142 F.3d 138, 148 (3rd Cir. 1997) (en banc); *Stone* v. *City of Mount Vernon*, 118 F.3d 92 (2d Cir. 1997), cert. denied, 118 S. Ct. 1044 (1998); 29 C.F.R. 1630.2(n)(3)(i) ("Evidence of whether a particular function is essential includes, *but is not limited to* * * * [t]he employer's judgment as to which functions are essential.") (emphasis added).

B. The ADA Requires Safety-Based Standards To Be Shown To Be Necessary To Avoid A Direct Threat To Health Or Safety

1. The ADA specifically addresses the subcategory of qualification standards which, like the binocular vision standard at issue here, are based on a safety rationale. The Act provides generally that qualification standards "may be a defense to a charge of discrimination" if they are "shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." 42 U.S.C. 12113(a). The Act further provides that such "'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. 12113(b); see also 29 C.F.R. 1630.2(r). In this context, a "direct threat" means a "significant risk" to the health or safety of others that cannot be eliminated by reasonable accommodation. 42 U.S.C. 12111(3).

Because of the statutory connection between "qualification standards" and the "direct threat" defense, the EEOC reasonably has concluded that a qualification standard based on a safety rationale must satisfy the "direct threat" standards. See 29 C.F.R. Pt. 1630 App. § 1630.15(b) and (c) ("With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the 'direct threat' standard * * * in order to show that the requirement is job-related and consistent with business necessity."). Accordingly, petitioner's binocular vision qualification standard must satisfy the "direct threat" standard. We note, however, that it makes little difference in this case whether the "direct threat" standard or some other explication of "job-related and consistent with business necessity" is used. Under any reasonable understanding of "business

necessity," there remain material issues of fact regarding whether petitioner's binocular vision standard is justifiable.

2. As this Court explained in *Bragdon*, the existence of a significant risk must be based on medical or other objective factual evidence. *Bragdon*, 118 S. Ct. at 2210; see also *School Bd.* v. *Arline*, 480 U.S. at 287-288. Such consideration may not rely on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes about the nature or effect of a particular disability or about disabilities generally. See 29 C.F.R. Pt. 1630 App. § 1630.2(r); Senate Rep. at 27; House Labor Rep. at 56-57; House Judiciary Rep. at 45-46. Moreover, the determination of whether an individual poses a safety threat to others requires an individualized assessment of the individual's present ability to perform safely the essential functions of the job. 29 C.F.R. 1630.2(r); 29 C.F.R. Pt. 1630 App. § 1630.2(r). See also *Arline*, 480 U.S. at 287; House Labor Rep. at 56. In enacting the ADA, Congress recognized that employers often wrongly excluded persons with disabilities from employment because of misplaced concerns about safety or liability. See House Judiciary Rep. at 30-31. An employer's subjective belief that a significant risk exists, even if maintained in good faith, therefore will not relieve the employer from liability. See *Bragdon*, 118 S. Ct. at 2210.

C. Petitioner Was Not Entitled To Summary Judgment, Because There Were Significant Issues Of Material Fact Concerning Whether Its Binocular Vision Standard Was Justified

1. There was substantial evidence in the record that respondent's requirement that its truck drivers have binocular vision does not satisfy the ADA. For example, at the time respondent was dismissed, DOT had determined that existing studies "d[id] not provide a sufficient nexus between the current vision requirements and driving per-

formance." See 57 Fed. Reg. 31,459 (1992).[15] According to DOT, there was evidence that persons with disabilities learn to compensate for their disabilities over time, and that past driving experience can be used to predict future results. 59 Fed. Reg. 50,888 (1994) (describing 1992 decision).

Moreover, respondent's optometrist testified that, although stereopsis—the ability to judge depth using both eyes working together—"is * * * limited to the short distances rather than the long distances[,] [w]e rely on other cues for depth at the long-range distances." J.A. 300. She went on to describe those cues, including "motion parallax," "linear perspective," "overlay contours," "distribution of highlights and shadows," the "size of known objects," and "aerial perspective." J.A. 301. She also referred to a scholarly article discussing the issue. J.A. 300. She concluded that "in certain situations like distance viewing," "stereopsis * * * [is] not going to be a really particularly relevant or necessary skill." J.A. 301.

Finally, respondent presented evidence that he had been safely driving commercial vehicles since 1979, that his vision has remained constant, and that he was capable of driving as well as a similarly situated person with good vision in both eyes. J.A. 34-36, 286-287, 305-306. Those facts also support respondent's position.

2. Petitioner does not seriously dispute the above evidence. Instead, both petitioner and the dissenting judge in the court of appeals (J.A. 249-253) rest their argument on the fact that respondent cannot satisfy the DOT vision standards without obtaining a vision waiver. The fact that respondent could satisfy federal standards only by obtaining a waiver,

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[15] DOT also cited a 1982 study it had commissioned concluding that there was no correlation between accident rates and reduced visual acuity in drivers under age 54 and only a weak relationship in drivers over 60. 57 Fed. Reg. at 6794 (citing Bartow Associates, Inc., *The Monocular Driver: A Review of Distant Visual Acuity Risk Analysis Data* (1982)).

however, is insufficient to establish that petitioner is entitled to summary judgment on the qualification issue.

a. Under 29 C.F.R. 1630.15(e), "[i]t may be a defense to a charge of discrimination * * * that a challenged action is required or necessitated by another Federal law or regulation." At the time petitioner dismissed respondent, respondent had offered to obtain (and ultimately did in fact obtain) a vision waiver permitting him to obtain DOT certification despite his failure to satisfy the DOT binocular vision standard. Because a waiver would render the vision standard inapplicable to respondent, petitioner's dismissal of respondent was not "required or necessitated" by any "Federal law or regulation."[16] See 29 C.F.R. Pt. 1630 App. § 1630.15(e) ("The employer's defense of a conflicting Federal requirement or regulation may be rebutted * * * by showing that the Federal standard did not require the discriminatory action, or that there was a nonexclusionary means to comply with the standard that would not conflict with [the ADA]."); House Labor Rep. at 74.

The dissenting judge on the court of appeals mistakenly reasoned that petitioner was acting lawfully because it was merely "requiring compliance with DOT safety regulations." J.A. 251. Because DOT safety regulations permitted respondent to drive with a vision waiver, petitioner may not justify

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[16] Petitioner does not assert that the delay in obtaining the certification was a factor in its decision to dismiss respondent. If it made such a claim, the question would arise whether petitioner was obligated to permit such a delay as a reasonable accommodation. See 42 U.S.C. 12112(b)(5)(A) (stating that to "discriminate" under the ADA includes "not making reasonable accommodations" under specified circumstances); 42 U.S.C. 12113(a) (recognizing defense that employer was applying qualification standard where, *inter alia*, "performance cannot be accomplished by reasonable accommodation").

its choice to dismiss respondent on the ground that it was merely complying with federal safety regulations.[17]

b. Even though the DOT vision standards did not themselves require petitioner to dismiss respondent, petitioner could still employ those standards (or could adopt even more stringent standards of its own) if it could establish that the use of such standards satisfied the "direct threat" defense. The ADA is not intended to prevent employers from guarding against significant health and safety risks that might be posed by employing particular persons with disabilities. See *Bragdon*, 118 S. Ct. at 2210. Moreover, a particular employer may face conditions that demand stricter safety standards than those embodied in the DOT regulations. See J.A. 247 n.11.[18] Cf. *Bragdon*, 118 S. Ct. at 2211 (While the views of public health agencies are entitled to "special weight and authority[,] * * * [a] health care professional

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[17] Contrary to the dissenting judge in the court of appeals (J.A. 252), the analysis is not altered by the fact that the federal waiver program was an interim measure limited to a small group of drivers as part of a controlled study to determine whether the regulatory standards should be changed for all drivers. Nothing in federal law suggests that a waiver is invalid because it is issued as part of a controlled study.

[18] The court of appeals erroneously stated (J.A. 248) that "[i]n light of [DOT's] determination that waiver recipients do not pose a threat to public safety, * * * [petitioner] is precluded from asserting that they do." See also J.A. 247 (stating that the waiver program "precludes [employers] from declaring that persons determined by DOT to be capable of performing the job of commercial truck driver [through the waiver program] are incapable of performing that job by virtue of their disability"). Although DOT's views regarding whether those who receive vision waivers may safely drive commercial vehicles should be afforded substantial weight, nothing in the ADA precludes an employer from proving, if it can, that a particular safety standard higher than that required by DOT would be "job-related and consistent with business necessity," *i.e.*, would be necessary to avoid a "direct threat" within the meaning of the ADA. Indeed, DOT regulations expressly permit employers to establish more rigorous qualifications than those mandated by DOT. See 49 C.F.R. 390.3(d).

who disagrees with the prevailing medical consensus may refute it by citing a credible scientific basis for deviating from the accepted norm.").

It is significant that petitioner's binocular vision standard does not recognize DOT-approved waivers, and petitioner's standard in that respect is stricter than the standard embodied in DOT regulations. To justify its adoption of that stricter standard, petitioner may not simply rest on the similarity between its standard and the basic vision standard in the DOT regulations. To the contrary, the defense requires *all* qualification standards imposed by an employer to satisfy the "job-related and consistent with business necessity" or "direct threat" requirements. See Senate Rep. at 37 (Among the "three pivotal provisions to assure a fit between job criteria and an applicant's actual ability to do the job [is] * * * [t]he requirement that *any* selection criteria that screen out or tend to screen out [persons with disabilities] be job-related and consistent with business necessity.") (emphasis added). Aside from the similarity between its standard and the basic DOT standard, petitioner has not offered any basis for a ruling that, as a matter of law, its vision standard satisfies those requirements.

c. The analysis is not altered by the fact that the DOT rule instituting the vision waiver program was later vacated by the D.C. Circuit in *Advocates for Highway & Auto Safety* v. *Federal Highway Admin.*, 28 F.3d 1288 (1994). The court in *Advocates* held that the waiver program was invalid "because the agency lacked the data necessary to support its determination that the vision waiver program 'is consistent with the safe operation of commercial motor vehicles.'" Putting to one side the question whether *Advocates* was correctly decided, but see *Rauenhorst* v. *U.S. Dep't of Transportation*, 95 F.3d 715 (8th Cir. 1996) (reviewing history of vision waiver program and holding that DOT must issue waiver to applicant), that holding, in 1994, could not justify petitioner's dismissal of respondent in 1993.

First, the *Advocates* decision does not suggest that petitioner would have been out of compliance with federal law—or that petitioner would have believed itself to be out of compliance with federal law—if it accepted a vision waiver from respondent. Federal regulations, like other sources of law, are presumed valid until they have been held not to be so, and the proper method for challenging them is generally (as in *Advocates*) by means of an action under the Administrative Procedure Act, 5 U.S.C. 551. As the court of appeals in this case correctly held (J.A. 242), the D.C. Circuit's 1994 decision holding the vision waiver program invalid in *Advocates* cannot be used to justify an employment decision made by petitioner in 1993.[19] Cf. *McKennon* v. *Nashville Banner Pub. Co.*, 513 U.S. 352 (1995).

Second, the *Advocates* decision does not suggest that summary judgment could be granted to petitioner on the ground that the vision waiver standard was justifiable under the ADA's "direct threat" (or "job-related and consistent with business necessity") standard. The D.C. Circuit's decision at most means that DOT had failed to put in the administrative record sufficient evidence to satisfy what the court believed to be DOT's burden to show affirmatively that the vision waiver program would not result in "*any* diminution of safety resulting from the waiver." 28 F.3d at 1294 (emphasis added). The fact that DOT had failed to build an administrative record that satisfied the *Advocates* court, however (see note 19, *supra*), does not mean that the vision waiver program permitted unsafe individuals to drive commercial

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[19] Indeed, DOT revalidated the vision waiver program after the *Advocates* decision, based in part on evidence that it had gathered in 1992 but not placed in the administrative record. See 59 Fed. Reg. at 50,888. Thus, the vision waivers it has issued during the program remained valid until the program ended in 1996. At that time, drivers in good standing, like respondent, were accorded "grandfather" privileges making the vision standard in 49 C.F.R. 391.41(b)(10) inapplicable to them in the future, as long as they satisfy the conditions stated in 49 C.F.R. 391.64(b).

vehicles; it simply meant that DOT in that case had not justified its conclusion sufficiently to the court. And the fact that DOT failed to build a record sufficient to show the *Advocates* court that monocular drivers admitted to the waiver program may safely drive commercial vehicles does not establish that petitioner, in this case, has built a sufficient record to demonstrate that, as a matter of law, monocular drivers holding DOT waivers would pose a direct threat if permitted to drive commercial vehicles.

Finally, it is significant that petitioner apparently employs binocular drivers who merely satisfied the minimum federal standards, but not monocular drivers who, by obtaining waivers, demonstrated that they satisfied above-minimum standards in other respects. Vision waivers were available only to drivers of commercial vehicles who, during the preceding three years, had no license suspension or revocation, no involvement in a reportable accident, no conviction for a disqualifying offense or more than one serious traffic violation, and no more than two convictions for any other moving violation in a commercial vehicle. 57 Fed. Reg. at 31,460. In addition, waiver applicants were required, *inter alia*, to submit a statement from an optometrist or ophthalmologist certifying that they were able to perform the driving tasks required to operate a commercial motor vehicle. Once admitted to the program, drivers had to be examined by an optometrist or ophthalmologist each year and to submit the result to the Federal Highway Administration. *Ibid.* By contrast, as far as the record in this case shows, the drivers petitioner would have employed in their place would have had less driving experience and worse driving records than those who qualified for vision waivers, and they would not have had the same certifications and annual check-ups by optometrists and ophthalmologists to ensure that their vision had not worsened.

In these circumstances, notwithstanding the *Advocates* decision, petitioner's requirement of binocular vision is valid

only if it could justify employing the binocular drivers who satisfied the minimum standards rather than monocular drivers (like respondent) who had the added safety assurances provided by their satisfaction of the more stringent standards of the vision waiver program. Although it is possible that petitioner could satisfy that burden, nothing in the record would permit a court to conclude that, as a matter of law, petitioner has done so.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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